COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,
Respondents-Appellees,

AND

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

No. 642

OPINION AND ORDER, ENTERED JANUARY 7, 1982

PER CURIAM.

In *Matter of Colt Inds. v. Finance Administrator of City of N. Y.*, the order of the Appellate Division, 439 N.Y.S.2d 24, should be modified by deleting therefrom all declarations as to the constitutionality or applicability of former section 307 and subdivision 3 of section 720 of the Real Property Tax Law and by reversing so much of the order as denied petitioner's motion for discovery of "special

sales data listings" and remitting that motion to Supreme Court for further consideration and disposition in light of our decision in this case. As so modified, the order of the Appellate Division, should be affirmed and the consolidated proceedings remitted to Supreme Court. The question certified is answered in the negative.

In *Matter of Equitable Life Assur. Soc. of U. S. v. Finance Administrator of City of N. Y.*, the order of the Appellate Division, 441 N.Y.S.2d 385, should be modified to the extent of granting petitioner's motion to dismiss those defenses which rely on the New York City Administrative Code's purported authorization of a classified system of assessment. As so modified, the order of the Appellate Division should be affirmed. The question certified should be answered in the negative.

Section 166-1.0 of the Administrative Code of the City of New York governs the procedure for review of tax assessments in the City of New York. By its terms, taxpayers may challenge the assessed valuation of their property on the grounds that it is illegal, that it overvalues the property, or that "the assessment is erroneous by reason of inequality." That section further provides that inequality may be proven by showing that the assessment was "made at a higher proportionate valuation than the assessment or other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year". To hold, as the courts below have, that this procedural provision is legislative authorization for a classified system of assessments in the City of New York improperly expands the scope of the section. In these proceedings to challenge tax assessments on the ground of inequality, we have no occasion to reach and, therefore, do not address the contentions of the parties with respect to the methods or systems of as-

sessments in New York City. Our attention is focused on assertions of inequality of actual assessments whatever the means or basis on which they were made. Thus, we hold that this section authorizes taxpayers who challenge the assessments of their real property to present proof of inequality based on either or both of two theories—that the particular assessment "has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section", or that the assessment "has been made at a higher proportionate valuation than the assessment of * * * other real property on the assessment rolls of the city for the same year." Thus, proof may be introduced to establish inequality with respect to property of similar character in the same ward or section or with respect to the city-wide assessment rolls. In continuing this proceeding, petitioner should be allowed to introduce either or both types of proof.

There remains the question whether, if it is sought to establish inequality with respect to city-wide assessment rolls, State equalization rates may be introduced. (Cf. *Matter of Rokowsky v. Finance Administrator of City of N. Y.*, 41 N.Y.2d 574, 394 N.Y.S.2d 176, 362 N.E.2d 974; *Guth Realty v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E.2d 441.) Legislative action taken over the past few years to restrict the use of such proof and considered by the courts below [1] expired on October 30, 1981 and accordingly now has no application to this proceeding.

On December 3, 1981, however, the Legislature passed S-7000A over the Governor's veto (L.1981, ch. —). Section 7 of that bill contains a new subdivision 3 of

1. Amendment of subdivision 3 of section 720 of the Real Property Tax Law (L.1979, ch. 126, § 2; L.1981, ch. 3, § 1; L.1981, ch. 107, § 1; L.1981, ch. 259, § 1) and enactment of new section 721 of the Real Property Tax Law (L.1979, ch. 127, § 2; L.1981, ch. 3, § 2).

section 720.[2] This new legislation contains no express

2. The revised subdivision 3 of section 720 now reads:

"3. Evidence on the issue of whether an assessment is unequal shall be limited as hereinafter provided. The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue. In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be. Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement or tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of such statement or tabulation of values stated by his witnesses. The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to the following:

"(a) in all assessing units, actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made;

"(b) in all assessing units other than special assessing units as defined in section eighteen hundred one of this chapter, the state equalization rate established for the roll containing the assessment under review; or

"(c) in all special assessing units as defined in section eighteen hundred one of this chapter, only for proceedings commenced with respect to assessment rolls completed after December thirty-first, nineteen hundred eighty-three, the latest applicable class ratio established for the roll containing the assessment under review; provided, however, that such class ratios shall not be admissible pursuant to this paragraph unless the petitioner alleges and proves an inequality greater than twelve and one half percent of such class ratio."

provision for retroactive application as did the former law (L.1979, ch. 126, § 4; L.1979, ch. 127, § 3); it provides only, in section 17, that "this act shall take effect immediately". Accordingly to the extent that it is otherwise appropriate, it applies to proceedings pending on December 3, 1981.

We hold that this new subdivision 3 now applies to these proceedings. Although the proceedings were commenced prior to the enactment of S-7000A, no evidentiary hearings have yet been held or interlocutory determinations made as was the case in *Matter of Slewett & Farber v. Board of Assessors of County of Nassau*, 54 N.Y.2d 547, — N.Y.S.2d —, 430 N.E.2d 1294 [decided herewith]. Accordingly, when such evidentiary hearings are held in these cases on remittal following this appeal, among other considerations to be taken into account in rulings with respect to the admissibility of evidence will be the provisions of new subdivision 3 of section 720.

We further consider, on the basis of post-argument briefs submitted to this court after the enactment by the Legislature of S-7000A, the constitutionality of the new subdivision 3 of section 720 insofar as it is applicable to the litigation now before us. As did former subdivision 3, this section governs what evidence is admissible on the issue of whether an assessment is unequal. Data on selected parcels and actual sales are admissible as evidence to show an unequal assessment in all assessing units. Use of the State equalization rate, however, is limited to "all assessing units other than special assessing units."[3] The effect of this provision is to foreclose the use of State equalization rates in this type of proceeding in the City of New York and in Nassau County.

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3. A special assessing unit is defined by section 1801 as an assessing unit with a population of one million or more.

Petitioners claim that this is a restriction based on population and geographic area which violates their right to equal protection of the laws. They further claim that the excessive cost of proving a claim of unequal assessment associated with the remaining two methods of proof essentially bars them from seeking any redress and, therefore, constitutes a violation of their due process rights. Recognizing that subdivision 3 of section 720 is procedural in nature, we hold this section of the Real Property Tax Law, as enacted on December 3, 1981, to be constitutional.

The core of petitioners' equal protection claim is that the Legislature, by allowing the use of State equalization rates as proof of the ratio between assessed and full value in all parts of the State but the City of New York and Nassau County, makes an impermissible distinction between geographic areas of the State. "Equal protection does not require territorial uniformity of law within a State (*Salsburg v. Maryland*, 346 U.S. 545, 74 S.Ct. 346, 98 L.Ed. 281 [rules of evidence in prosecutions for gambling offenses]; *Missouri v. Lewis*, 101 U.S. 22, 25 L.Ed. 989 [access to appellate courts])." (*Matter of Rosenthal v. Hartnett*, 36 N.Y.2d 269, 274, 367 N.Y.S.2d 247, 326 N.E.2d 811.) It has long been the rule that the State Legislatures may make such geographic distinctions without denying any person equal protection of the laws. The Supreme Court in *Missouri v. Lewis*, 101 U.S. 22, 31, 25 L.Ed. 989 stated: "If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amend-

ment, be a denial to any person of the equal protection of the laws."

The distinction made by this legislation, although not based on geographic factors, is neither impermissible nor unreasonable; rather, the distinction is based on size of population within municipal units.[4] To strike down this provision, it must be shown that the Legislature acted unreasonably—that is, that the Legislature did not have a rational basis for creating such a distinction.

The Legislature had a rational basis for designating the City of New York and Nassau County special assessing units and restricting the admissibility of State equalization rates in such units. This legislation which was designed to overrule this court's decision in *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 279, which required full value assessment for all property, recognized the unique nature of those communities with their high density of population and diversity of property.

Petitioners further contend that by restricting the use of State equalization rates as proof of the ratio between assessed and full value in special assessing units, their right to due process of the law has been violated. This argument is premised on claims that the other authorized methods of proof, selected parcels and sales, are prohibitively expensive so that petitioners, and similarly situated parties, are effectively foreclosed from challenging the rate of assessment of their property. While a "law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law" (*Board of Comrs. of Excise of City of Auburn v. Merchant*, 103 N.Y.

4. The application of this distinction, as well as every differentiation among municipal units, whatever its basis, will have a geographic consequence.

143, 148, 8 N.E. 484), it cannot be said that this legislation has been shown, on its face, to constitute such a deprivation. The fact that these procedures are admittedly more cumbersome and expensive does not require a holding that there is a deprivation of due process. (*Gibbes v. Zimmerman*, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342.) The Legislature, in its wisdom, has seen fit to restrict the admissible proof to selected parcels and sales data and there are no grounds for this court, by judicial fiat, to authorize additional proof. The Legislature did no more than restore, in special assessing units, the *status quo ante* chapter 942 of the Laws of 1961 which first authorized the admission of State equalization rates.

Once the ratio between assessed value and full market value has been determined, petitioners will be required to establish the fair market value for the property against which the ratio will be applied to determine whether the assessment is proper. Because sales data of comparable property is one method of establishing a fair market value, petitioner Colt Industries' motion for discovery of that data is remitted to Supreme Court for further consideration and disposition in light of our decision in this case. Assuming petitioner can show a correlation between those listings and the question of fair market value, discovery should be granted.

COOKE, *C.J.*, and JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, *JJ.*, concur in *Per Curiam* opinion.

In *Matter of Colt Inds. v. Finance Administrator*: Order modified, without costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

In *Matter of Equitable Life Assur. Soc. v. Finance Administrator*: Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX
COMMISSION OF THE CITY OF NEW YORK,
Respondents-Respondents,

ROBERT ABRAMS, Attorney General
of the State of New York,
Intervenor.

No. 10560-61

Index No. 56322/77
Block 1291, Lot 69

and

Index No. 56323/77
Block 1374, Lot 49 S.E.

**OPINION AND ORDER,
ENTERED MAY 12, 1981**

Supreme Court, Appellate Division, First Department. May 12, 1981. D. S. Greenfield, New York City, for appellant. L. Olarsch, New York City, for respondents-respondents. J. M. Farrar, New York City, for intervenor-respondent. Orders, Supreme Court, New York County (Mangan, J.), entered on August 12, 1980, affirmed on

the opinion of Mangan, J., at Special Term, without costs and without disbursements.

All concur, except Murphy, P. J. who dissents in part in a memorandum as follows:

I would grant Equitable's motions for summary relief only to the extent of declaring RPTL § 720(3) to be unconstitutional insofar as it is retroactively operative against pending petitions covering tax periods prior to May 22, 1979. (See partial dissent in *Colt Industries v. Finance Administrator*, 81 A.D.2d 777, 439 N.Y.S.2d 24.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE TAX
COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56323/77
Block 1374, Lot 49SE
Index No. 56322/77
Block 1291/Lot 69

**TRANSCRIPT OF AUGUST 7, 1980
HEARING ON MOTIONS, CONTAINING
VERBAL ORDER DENYING MOTIONS**

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60 Centre Street
New York, New York
August 7, 1980

Before:

HONORABLE MARGARET M. J. MANGAN, Justice

Appearances:

MESSRS. MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Petitioners
430 Park Avenue
New York, New York 10022
By: DANIEL S. GREENFIELD, ESQ.,
ALLEN G. SCHWARTZ, ESQ.
Corporation Counsel, City of New York

By: MORTIMER TRAKTMAN, Assistant Corporation Counsel

THE COURT: All right, now we have five different motions?

MR. GREENFIELD: That's correct, your Honor.

THE COURT: Are you going to argue the whole five?

MR. GREENFIELD: Yes, your Honor. I am appearing for Equitable and I am appearing of counsel for Mr. Krieger on the United Nations.

THE COURT: The five motions are really similar so that the argument for one is applicable to all five?

MR. GREENFIELD: That's correct, your Honor. I am also appearing for 540 Madison Avenue Associates, so those are the five motions.

THE COURT: You may start the argument.

MR. GREENFIELD: Thank you, your Honor.

The motions that were brought on before your Honor this morning essentially seek a determination that petitioner in these five proceedings, which are scheduled to be tried on the basis of inequality, may use the State Equalization Rate for the purpose of establishing the ratio.

I'm not going, unless your Honor would like me to, into the substantive basis for the motion.

THE COURT: No, I have made a determination of law on the State Rate in the Colt Industries matter.

MR. GREENFIELD: I recognize that, your Honor, and I am not as I said going to repeat the argument which has been fully set forth in our papers. I'm not going to go over them again.

What I would like to address myself to, and we have submitted reply affidavits on this point—but I would like

to address myself rather more specifically to some of the points raised by Mr. Traktman in the opposition affidavit that he submitted on these motions.

Mr. Traktman states I believe that petitioners did not have the right to make these motions which he characterized as motions for reargument of the Colt decision, and he indicated the petitioners were without standing to make those motions.

The petitioners in the cases before your Honor this morning were not party to the Colt decision.

THE COURT: Well, that is one phase of his argument, since you are not part—since you weren't a party to it, you cannot come in on it.

MR. GREENFIELD: We are not coming in on Colt your Honor. We were certainly not parties to it, so we are not bound by that decision in so much as the order in Colt and the decision in Colt do not refer to us. We would not be, as far as I know, collaterally estopped or subject to the principles of res judicata, so that the only way the Colt decision would be applicable to us would be if an order were entered essentially holding the decision in Colt applicable to our case.

At the moment we find ourselves betwixt and between, since Mr. Traktman apparently would like us bound by the Colt decision, but we are not in a position where we can appeal it because no order has been entered in these cases, which would afford us the opportunity to appeal the matter.

Mr. Traktman also seems to imply there was something incorrect in our seeking this order, and that our motivation at least in part was somehow to obtain an appealable order. We certainly recognize at least the possibility that your Honor will adhere to her decision in Colt in connection with the decision on the substantive aspects of this motion.

But as I indicated, at the moment we are not bound by it. Your Honor is certainly not bound by your Honor's decision in Colt. If your Honor so chose, your Honor would be certainly free to enter a different order.

THE COURT: Well, I would sound like a very inconsistent Judge if I made a decision so far reaching as the decision in Colt, to change my position on another motion.

MR. GREENFIELD: I am only indicating—

THE COURT: I am bound by my own decision which I have every confidence is a right application of the law as it applies to New York City.

MR. GREENFIELD: The third point of Mr. Traktman's affidavit which I would like to address myself is his statement that the purpose of making these motions is to obtain a stay of proceeding. That is not the purpose of the motions.

The purpose of the motions is to hopefully obtain the relief we seek, although we recognize of course your Honor's decision in Colt. And if your Honor adheres to your Honor's decision in Colt, we would then appeal that as expeditiously as we possibly can and seek to obtain a determination of the Appellate Courts, either affirming or reversing your Honor's decision, so that we can get the measure of certainty to which the petitioners here feel they are entitled to have at as soon a date as possible.

Now in connection with that, should your Honor determine to deny the substantive aspects of this motion, we have requested a stay of all proceedings. We have requested it because we feel and believe it fundamentally unfair that we are forced to undergo the expense of even the over-valuation portion of the trial, which is quite expensive on properties in the magnitude with which we are involved here, before we know what we're going to have to establish in order to prove inequality.

For that reason, we strongly and respectfully urge that we be given the opportunity to go to the Appellate Division, if necessary the Court of Appeals, if necessary the Federal Courts, but to obtain a final definitive determination on these points before we have to advise our clients, before our clients have to reach a determination as to whether they are going to spend the money, even in the context of the over-valuation portion of the trial.

It is in that context that we have alternatively made our request for a stay.

THE COURT: Allright, Mr. Traktman, I'll hear you.

MR. TRAKTMAN: If your Honor pleases, I think Mr. Greenfield has outlined his papers quite well to you and possibly summarizes our position. If your Honor will recall, there was a multiple—

THE COURT: Fifty motions.

MR. TRAKTMAN: —a couple of weeks ago before you for a stay, at which time Mr. Kaufman, on behalf of the tax certiorari bar, most eloquently expressed the same sentiments and reasons for a stay.

Your Honor heard those motions, some 30 or 40 of them—

THE COURT: Fifty of them.

MR. TRAKTMAN: —and ruled that the stay would not issue. I fail to see any distinction between the five cases now before us and those. As Mr. Greenfield says, the bottom line of his argument was that they do want an opportunity to contest the Court's ruling in Colt, vis-a-vis the use of the State Equalization Rate, and as to whether or not 166-1.0 governs New York City proceedings.

In sum, that is the City's position. With regard to a stay, since we took no position at the prior motion, we adhere to that same position now.

THE COURT: All right, in passing I would like to comment on the innuendo in Paragraph 3 of Mr. Greenfield's affidavit, and elsewhere, in the papers he has prepared, it states that no formal notice of a trial set had been given to petitioner.

On July 15, 1980, on the day I heard some 50 odd motions seeking a stay of inequality trials, a representative of Marshall, Bratter, Greene, Allison, Tucker & Greenfield sat in this courtroom and was instructed by a member of my staff, at the conclusion of the Court's remarks, to obtain a copy of the reorganized Special 9 inequality calendar.

I would have had it that day, but the IBM machine was out of order. So I deferred it to the following day.

Just as calling a piece of granite a diamond does not alter its substance, nor preclude an inquiry into its essential nature, titling a motion as one for summary judgment does not necessarily make it so.

In the matter of Colt Industries, petitioner therein sought partial summary judgment with the intention of removing what he perceived as the barriers to proof of inequality by utilization of the S.B.E.A. rate. The first branch of the relief sought in the motions before me this morning boils down as a declaration by this Court that petitioners may prove inequality by using the S.B.E.A. rate.

At Paragraph 6 of the Greenfield affidavit, I quote the following: "It is respectfully suggested, for the reasons shown in the accompanying memorandum of law, that Colt was incorrectly was decided. We therefore urge that this Court reconsider its decision in Colt and grant the relief requested."

The "defenses" that petitioner seeks an order dismissing are not defenses that have been pled by the City. They are for the most part the essence of the Court's decision in Colt Industries. In fact, petitioners' motions seek

to reargue the decision of this Court in Colt Industries.

However, they have no standing to do so since none of the movants this morning were parties to the Colt matter. Accordingly, petitioner's motion for reargument of the decision in Colt Industries are respectively denied.

The alternative relief sought is a stay of trial pending an appeal from a denial of petitioner's motions. As I have indicated, these motions are for reargument, not for summary judgment, and a denial of a motion for reargument is not appealable.

Therefore, there is no basis to stay the trial of these matters pending an appeal from these motions.

The larger issue of a stay of inequality proceedings generally was addressed by this Court from the bench on July 15, 1980, and these remarks are incorporated herein.

Something of a new "wrinkle" is presented in movants' papers with the affidavit of Mr. Haims' estimating the cost of approving inequality. Mr. Haims' estimate for analyzing all the sales in Section 5 is inapplicable, since under Colt petitioner must prove that he has unequally assessed against the other real properties of like character.

Haims' estimate of an analysis of parcels and sales in Section 5 of like character is at maximum $850,000. This is, of course, an estimate.

Several facts will place it in prospective. There are some 1500 office buildings in Manhattan assessed at about $6.7 billion. At least $2.3 billion of this total is found in Section 5. Over the span of eight years, which is the basis of Haims' estimate, the assessments on Section 5 office buildings would total at least $16 billion.

The average assessment on a Manhattan office building for 1976-1977 is about $4.5 mil. Justice Schwartz and this Court have some 40 office buildings in Section 5 on our respective calendars. Using eight years as the basis of an estimate, the assessment that would be in review would be at least $1⅛ billion. A cost of $850,000 to analyze com-

parable parcels and sales in Section 5 begins to pale against such numbers.

In addition, I commend to petitioner's attention Real Property Tax Law 716 and its provisions for the amelioration of expenses of proving inequality.

Further, it is my intention, if petitioners wish and insofar as it is practicable—to hold a joint ratio trial of like kind office buildings in Section 5, which will afford an additional opportunity to avoid duplicate expenses and distribute the costs of moving inequality.

Where a common question has been raised, an opportunity to be heard is provided. I refer counsel to the cases of Schwartz against Public Administrator and Molloy against Trombly.

Let me make clear that this Court does not intend to force petitioners to do anything. You may rely on the S.B.E.A. rate and I will dismiss. For even if Section 166-1.0 of the Administrative Code is not as I read it, Real Property Tax Law 307 requires proof of inequality intraclass, and Real Property Tax Law 720, Subdivision 3, precludes the use of the S.P.E.A. rate.

At the point of such dismissal you will then have a clear issue to bring before the Appellate Division and therewill be no need to attach the appellation "summary judgment" to what is in fact a motion to reargue.

That is the decision of the Court. Have a happy vacation.

MR. GREENFIELD: I would like to ask only whether I can submit a simple order this afternoon for signature.

THE COURT: The motion to reargue is denied and I will submit an order to that effect.

MR. GREENFIELD: Thank you, your Honor.

THE COURT: Which, I might add, is not appealable.

(Whereupon the proceedings were concluded.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of The Application Of
COLT INDUSTRIES, INC.,

Petitioner,

—against—

THE TAX COMMISSION OF THE
CITY OF NEW YORK,

Respondent.

Index No.
Block 1291, Lot 38

ORDER AND MEMORANDUM OPINION, ENTERED JUNE 12, 1980

The proceeding underlying the motion is grounded in petitions filed by Colt Industries, Inc., alleging the tax assessments levied upon its eighteen-story modern office building located at 430 Park Avenue, New York County, Block 1291, Lot 38, for tax years 1969-70 through 1972-73 and 1974-75 through 1976-77 are erroneous by reasons of overvaluation and inequality in that the same are in excess of the full value of the said real property and in that said assessments are proportionately higher than similar property in the City of New York.

Petitioner seeks:

(1) an order consolidating the petitions filed;

(2) an order directing respondent to disclose to petitioner "special sales data listings" for 1969 through 1978;

(3) partial summary judgment declaring unconstitutional what petitioner perceives as the statutory impediments to proof of inequality, sections 307 (L. 1978,

ch. 476, sec. 1) and 720(3) (L. 1979, ch. 126, sec. 2) of the Real Property Tax Law (RPTL).

Petitioner intends to prove the allegation of inequality by utilizing the citywide equalization rate established by the State Board of Equalization and Assessment (SBEA). RPTL, section 307 sets the standard of assessment in certain assessing units and defines an inequality pleading. The progenitor of RPTL, section 307 is RPTL, section 706 (L. 1977, ch. 438, sec. 1; L. 1958, ch. 959, Tax Law sec. 290-c, formerly sec. 290 added L. 1909, ch. 62, L. 1896, ch. 908, L. 1880, ch. 296) which, as it relates to inequality, requires a pleading:

> • • • if unequal • • • that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll. • • •

Thus, the standard established measures inequality against all property upon the tax roll (whole-roll inequality). RPTL, section 307, which petitioner challenges herein, redefines by narrowing the scope of an inequality pleading by requiring that petitoner allege intra-class inequality:

> • • • that the assessment has been made at a higher proportionate valuation than the assessment of other taxable real property of the *same major type* as determined by the State Board of Equalization and Assessment • • • (emphasis added).

In the City of New York, an inequality pleading is governed and the standard of assessment is set[1] by the Administrative Code of the City of New York, section 166-1.0(b):

> Such (judicial) review shall be allowed only on one or more of the following grounds . . . : • • • the assess-

1. In averring that sec. 307 impermissibly delegates taxing authority, petitioner acknowledges that the pleading section defines the authority of the assessor.

ment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the *assessment of other real property of like character* in the same ward of section, or other real property on the assessment rolls of the City for the same year, specifying the instances in which such inequality exists and the extent thereof * * * (emphasis added).

For well over a century, the State Legislature has recognized by special legislation applicable only to the City of New York, the need for a dichotomy between the State and the City of New York in the levy and review of assessments. The present system of assessment in the City of New York has its origin in L. 1857, ch. 677, sec. 24, which provides for a writ of certiorari to review and correct decisions of the Commissioner of Taxation. Section 24 of the Act of 1857 was reenacted as section 20 of Chapter 302 of the Act of 1859; writs issued under the Act reviewed questions of illegality and overvaluation only (Marlborough Hotel Co. v. Feitner, 33 Misc. 293, 297). In 1882, the State legislature consolidated all existing legislation in regard to the City of New York and the Act of 1859 was reenacted as L. 1882, ch. 410, section 821. In 1885, the legislature, fearing that the general tax act of 1880, which for the first time allowed review of inequality as well as illegality and overvaluation (L. 1880, ch. 296, section 1), might be deemed to apply to the City of New York, passed an amendment to section 821 of the Consolidation Act by which the writ of certiorari in New York City was confined to questions of illegality and overvaluation. The Supreme Court was precluded from exercising by the writ the power to review assessments in the City of New York which were unequal. (1 Columbia Law Review 419, 422 [1901]), while in the remainder of the State, under L. 1880, such review was available. This dichotomy between the State and City limiting review by

certiorari to the grounds of illegality and overvaluation in the City was held not violative of the equal protection clause of the 14th amendment; such constitutional provision, it was held, did not prohibit local or special legislation (People ex rel. Second Avenue R.R. Co. v. Coleman, 21 New York State Rep. 178; People ex rel. Manhattan R. R. Co. v. Coleman, 48 Hun. 602). It is beyond argument that the legislature was conscious of the particular problems associated with taxation of realty within the City and the need for special treatment.

With the creation of Greater New York by the Incorporation of the Counties of Kings, Queens, the Bronx and Richmond, there existed property owners who, before incorporation into the City, had the right to proceed on whole roll inequality under L. 1880, ch. 296. Accordingly, when the Charter for Greater New York was passed (L. 1897, ch. 378), the Act of 1880 (General Tax Law) was closely adhered to and by section 906 of the Charter, real estate assessments were allowed to be questioned by writ of certiorari on the ground of inequality.[2] Recognizing its force and effect as special legislation controlling over the general tax law (L. 1896, ch. 908), a number of cases held that to the extent the Charter differed from the general tax law, the Charter, as special legislation, was controlling (People ex rel. Zollikoffer v. Feitner, 34 Misc. 299; aff'd 63 App. Div. 615, aff'd 168 N.Y. 674; People ex rel. Lazarus v. Feitner 65 App. Dv. 318; aff'd 169 N.Y. 604; People ex rel. Stewart v. Feitner, 95 App. Div. 481).[3]

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2. Ash, Greater New York Charter, 1897 "Report of the Committee on Draft of Proposed Charter" p. CXXII.

3. A continuing distinction between State and City remained under the Charter for Greater New York since City residents could not challenge as unequal personal property assessments while outside the City petitioners had such right.

Whole roll inequality was to be the law in the City of New York for but four years (1897-1901) for, in 1901, without the acceptance of the City of New York, the legislature amended the Charter (L. 1901, ch. 466, section 906). The statutory standard of inequality was changed and much narrowed to require of petitioners an

> • • • that the assessment has been made at a higher proportionate valuation than the assessment of other real estate of like character in the same ward or selection or other real estate on the tax rolls of the City for the same year, specifying the instances in which such inequality exists. • • •

For an example of implementation of the "like character" standard see People ex rel. O'Neil v. Purdy, 188 App. Div. 485 (1919). For an example of the application of like character inequality outside New York see Mason v. Board of Review, Madison County, Iowa, 250 Iowa 291, 93 N.W. 2d 732. Section 166.1-0 of the Administrative Code of the City of New York setting forth the present statutory standard is replication of the standard contained in the Charter of 1901.

The City of New York Administrative Code provisions dealing with real estate taxation within the City are special legislation controlling over the general statute (N.Y. Const., Art. 12, section 2 [1924]). The New York City Administrative Code is the successor legislation to the 1901 Charter of the City of New York and was passed by a two-third vote of the legislature on emergency message and message of necessity from the Governor. The Administrative Code became law in December, 1937. The 1937 codification segregated the various provisions of the Greater New York Charter and related laws into: (a) a simpler form of Charter containing essentially the structural parts of City government and (b) an Administrative Code.

The City of New York assesses income property at a higher percentage of market value than private residential properties. This is classification. Implicit in a duly authorized system of classified assessments is the authority to fractionally assess. For properties to be assessed at different proportionate valuations, some property must be assessed at a percentage less than 100 percent of fair market value. This conclusion is not simply one of logical inference, since the State legislature, in authorizing the City taxing authority to equalize the tax burden, recognized this as early as 1857. (L. 1857, ch. 677, Sec. 13; L. 1859, ch. 302, Sec. 11; L. 1882, ch. 410, Sec. 819; L. 1897, ch. 378, Sec. 899; L. 1901, ch. 466, Sec. 899 continued to date Administrative Code Sec. E17-130). Equalization and inequality are not interchangeable terms. People ex rel. Yaras v. Kinnaw, 303 N.Y. 224, 239. As of 1901, the City of New York had authority under special legislation to fractionally assess, classify its tax roll and equalize its assessments. Where the power to classify exists, an inequality action can only be determined within the class. This remains the case today within the City of New York, which has legally classified its tax roll, unchanged by Hellerstein v. Assessor of the Town of Islip, 37 N.Y. 2d 1, which declared fractional assessments illegal in jurisdictions that have classified without authority of law. If every taxing authority outside the City of New York taxed at a uniform fraction of value, the petitioner in Hellerstein would have had no cause to complain. In fact, the essence of petitioner's complaint in Hellerstein was that he was unequally assessed and that, because the entire tax roll was fractionally assessed, he was at a distinct disadvantage in establishing that unequal treatment. Fractional assessments hide inequality Hellerstein, supra at 13.

A simple solution to the consternation caused by this landmark decision's mandate of full valuation, where some

property owners have enjoyed favorable treatment at the hands of assessors is to value property at full value and with authority classify the tax rate in accordance with the longstanding practice in the particular jurisdiction. Discrimination will then be open, aboveboard and legally constituted.

A legally constituted reasonable standard of classification does not violate the United States Constitution. Equal protection does not require identity of treatment, but only that classification rest on real not feigned differences, that the distinction have some relevance to the purpose for which classification is made. Walters v. City of St. Louis, 347 U.S. 231; Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232; Allied Stores of Ohio v. Bowers, 358 U.S. 522; Roosevelt Raceway v. County of Nassau, 18 N.Y. 2d 30. Nearly one hundred years ago, in 1885, the legislature recognized the special needs of the City of New York and the difficulty of equating the tax value of commercial properties with that of residences.

Section 166-1.0 of the Administrative Code, authorizes a classified system of taxation within the City of New York. The section requires the complaining taxpayer to demonstrate unequal treatment by comparison with "other real property of like character in the same ward or section . . ." It continues "or other real property on the assessment rolls of the City for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby." The only tenable construction of this statute is that a taxpayer is in the first instance required to prove unequal treatment as against other property of like character in the same wad or section. A modern Park Avenue office building will have no difficulty in finding properties of like character in the immediate locale with which to compare its ratio of assessment: market value. Place this same

building in Rego Park, Bensonhurst, Staten Island or Riverdale and the likelihood of finding like character property would be remote. Where the protesting taxpayer is unable to demonstrate inequality as against property of like character within the ward or section, the universe of comparison is expanded to other real property of like character on the assessment rolls of the City.

Construction of section 166-1.0(b)(3) as permitting proof of inequality: on the basis of a restrictive like character classification; or alternatively as against any and all properties roll-wide regardless of like character is logically repugnant because:

(1) The City of New York has and continues to discriminate between private residences and income property as to the tax burdens levied.

(2) Property owners and the specialized certiorari bar have recognized over the past seventy-nine years that the City has so discriminated and have not urged whole-roll inequality. Over these same seventy-nine years, more than 60 million assessments have been levied in the City of New York and not once have they served as a basis for a roll-wide demonstration of inequality. Petitioner, in his extensive memoranda, submitted in support of this motion (p. 2) cites Stewart v. Feltner, 95 App. Div. 481 (1st Dept. 1904) and Mutual Reserve Fund Life Association v. Feltner, NYLJ Vol. 34, No. 66, Dec. 29, 1905, p. 1, as indicating that inequality proceedings were the norm in the early part of the century. While subsequent to the 1901 Charter, these cases dealt with petitions for taxes levied prior to its enactment, that is, these cases dealt with whole-roll inequality under the City Charter of 1897. Since the Charter of 1901 restricting proof to like character, inequality proceedings within the City became virtually non-existent indicating ac-

knowledgement that assessors acted under authority of law in classifying property for tax purposes and that the standard of proof was intraclass inequality.

(3) A consideration of the historical development of present Administrative Code section 166-1.0 clearly indicates the intention of the State legislature to establish a different standard of proof of inequality in the City of New York and hence a different standard of assessment than is applicable elsewhere in the State.

(4) The Legislative enactment of a dichotomy in the proof of inequality within the City (like character) as compared to the rest of the State (whole-roll) was understood by the property owners and legal community who certainly owned and represented properties within as well as outside the City and who recognized and adapted to the different standard of assessment. Every tax certiorari proceeding outside the City of New York (except illegality) was and still is an inequality action whereas inequality actions within the City have been as rare as a robin in December.

In view of the foregoing and reiterating that the City of New York has the authority to fractionally assess and classify its tax roll under the Administrative Code section 166.01 as special legislation, RPTL section 37 is inapplicable to an inequality action in the City of New York (as is RPTL sec. 706) and petitioner's objections to this section as unconstitutional are of no moment.

Too, the objections raised to section 720(3) L. 1979, ch. 126, sec. 2, which presently precludes the use of the SBEA rate in a certiorari proceeding are without merit. The prescient statement of Gabrielli J. in Guth Realty v.

Gingold, 34 N.Y. 2d 440, 451 that "of course, the taxing authority will always be entitled to show that the equalization ratio is inappropriate to the taxing unit, to the category of property involved and to the particular property for any other valid reason which would affect its relevancy or weight" could not be more pertinent.

The SBEA rate as promulgated for the City of New York measures the ratio of total assessed valuation of property in the City against the total market value of realty within the City. The rate thus projected reflects a whole roll ratio. It cannot, under any circumstances, be used as a reliable measure of intraclass inequality (like character).

As discussed by Justice Hogan in 860 Executive Towers v. Board of Assessors, County of Nassau (84 Misc. 2d 525, 540), the basis for determining State equalization rates is a survey made by the SBEA once every two or three years. For example, State rates for 1976 were based on 1973 and 1974 market levels. This time delay aspect of State rates were they legally permitted at all in certiorari proceedings is an additional reason why they are inappropriate to the City of New York. A miniscular number of the City's parcels (2,911 office buildings), approximately one-third of 1 percent, make up almost 22 percent of the tax base of the City, exclusive of utilities and special franchises. Office buildings constitute 43 percent of the tax base of New York County and over 9 percent of the total assessed valuation within the State of New York. Yet these same parcels represent but .00062 of the tax parcels in the State. Real estate is an industry in the City of New York, a very vital industry, and value fluctuations experienced by major office buildings within the business cycle, together with the time delay in development of State rates, make these rates an unacceptable and inappropriate measure of inequality within the City of New York. This would be true even if the rates were promulgated on

a class basis, which they are not, assuming that a time delay was still the case. This single fact is sufficient basis for the rejection of the rate within the City of New York.

Even if the City tax rolls were unclassified, the Court finds no merit to petitioner's claim of constitutional deprivation by reason of enactment of a statute prescribing the use of the SBEA rate. The legislature acted within its authority to alter rules of evidence, to which litigants possess no vested right.

The findings herein are in no way contrary to the holding in Rokowsky v. Finance Administrator (41 N. Y. 2d 574 aff'g no opinion 51 A. D. 2d 694 aff'g 80 Misc. 2d 801). The issue in Rokowsky arose when a taxpayer sought, under authority of Guth v. Gingold (supra), to prove inequality on the basis of the SBEA rate promulgated for Bronx County. Respondent Tax Commission, cross-moved and sought technical dismissal contending the taxpayer's pleading did not comply with Administrative Code 166-1.0. The question whether section 166-1.0 was a special statute was not raised at Special Term or in the Appellate Division. The question presented to the Court of Appeals was "Does Administrative Code section 166-1.0 require that a taxpayer plead inequality only on a citywide basis, thereby ignoring inequities that arise within the individual borough and in disregard of the separate tax rate for each borough?" (See petitioner-respondent's brief Court of Appeals, p. 4.)

On this narrow issue, the Court of Appeals held "Since the City equalization rate * * * is available, it should control insofar as equalization rates may now be used to establish 'true' value * * *" (Guth Realty v. Gingold, 34 N. Y. 2d 440, 449). The holding in Rokowsky certainly does not preclude a local taxing authorite from challenging the use of the equalization rate per se and as inappropriate to the taxing unit or to the category of property (Guth Realty v. Gingold, supra 451).

To the implicit question raised by Rokowky, i.e., the extent that the equalization rate may be used as a measurement of inequality within the City of New York, the answer is not at all.

Petitioner seeks as part of this motion access to the sales data taken from the Real Property Transfer Tax Returns filed by taxpayers pursuant to Title II. Chapter 46, Section II 46-15.0 of the Administrative Code of the City of New York. With this information, petitioner, should it be unable to use the SBEA rate as a measurement of inequality, seeks to establish a roll-wide ratio based upon actual sales. Because a roll-wide ratio is neither appropriate or relevant to the determination of intraclass inequality, the motion directed towards discovery is denied. A further reason for denial may be found in Administrative Code, Section II 46-15.0 which makes such disclosure unlawful.

The pending tax petitions are consolidated and the motion in all other respects denied.

Within ten days of this decision, movant shall serve upon respondent a demand for admission of percentage of full value at which the subject property is assessed. Should respondent fail to so stipulate and the parties not agree on the parcels to be appraised, application to select the parcels is to be made without delay to this Court. On Aug. 17, 1980, the parties shall simultaneously file a statement or tabulation of the appraised values placed upon the selected parcels. Appraisals and/or sales otherwise are to be exchanged in accordance with the rules of this Court. The appraisals are to conform with the appraisal format available from the Clerk of this Part. All appraisals and sales shall include the cubic foot area of the improvements.

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE
TAX COMMISSION OF THE CITY OF NEW YORK,
Respondents-Appellees,

AND

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

No. 168

ORDER DENYING MOTION FOR REARGUMENT, ENTERED MARCH 23, 1982

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE
TAX COMMISSION OF THE CITY OF NEW YORK,
Respondents-Appellees,

AND

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

No. 642

**DECREE APPEALED FROM,
ENTERED JANUARY 7, 1982**

In *Matter of Equitable Life Assur. Soc. v. Finance Administrator:* Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

The portion of the opinion of the Court of Appeals of New York, which is the decision from which this appeal is taken, modifying the order of the Appellate Division and, as so modified, affirming it, is set out above. No separate judgment or decision was entered by the Court of Appeals in this matter.

COURT OF APPEALS
STATE OF NEW YORK

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND TAX COMMISSION OF THE CITY OF NEW YORK,
Respondent-Respondent,

—and—

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1257(2), Appellant, The Equitable Life Assurance Society of the United States, appeals to the Supreme Court of the United States from so much of the decision of the Court of Appeals of the State of New York, entered January 7, 1982, as denied Petitioner-Appellant the right to rely on the aggregate ratio of assessment-to-fair market value in the City of New York, as promulgated by the State Board of Equalization and Assessment.

Dated: New York, New York
March 22, 1982

Yours, etc.,

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Petitioner-Appellant
430 Park Avenue
New York, New York 10022

TO: Joseph W. Bellacosa, Esq.
Clerk, Court of Appeals
State of New York
Albany, New York 12207

Frederick A.O. Schwarz, Jr.,
Corporation Counsel
Attorney for Respondent-Respondent
100 Church Street
New York, New York 10007

Robert Abrams, Attorney General
of the State of New York
Two World Trade Center
New York, New York 10047

Filed with the Court of Appeals of New York on March 29, 1982. Served on the Department of Law of the State of New York and the Corporation Counsel of the City of New York on March 26, 1982.

Supreme Court of the United States

No. A-1080

EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Appellant

v.

FINANCE ADMINISTRATION AND
TAX COMMISSION OF THE CITY OF NEW YORK
AND ROBERT ABRAMS, ETC.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time within which to docket an appeal in the above-entitled case be, and the same is hereby, extended to and including August 20, 1982.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of June, 1982.

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION, BLOCK 1374, LOT 49 S.E. ("Greenfeld Affidavit I")

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In The Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56323/77
Block 1374, Lot 49SE

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL S. GREENFELD, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys for petitioner in the above-entitled action. This affidavit is made in support of petitioner's motion for an order pursuant to Rules 3211(b) and 3212(e) and Section 2201 of the Civil Practice Law and Rules:

(A) Dismissing, on the ground that they are without merit and granting partial summary judgment

with respect to the following defenses in this action relative to the use by petitioner of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") for the purpose of establishing a cause of action based on inequality under Section 166-1.0 (b)(3) of the Administrative Code of the City of New York and under Sections 306, 307, 706 and 720 of the Real Property Tax Law of the State of New York;

(i) that use of the Equalization Rate is precluded because Section 166-1.0(b)(3) of the Administrative Code of the City of New York by its terms authorizes a classified system of assessment for real property tax purposes, which system exists in fact; and

(ii) that no other section of the Administrative Code, specifically Sections E17-8.0 and E17-11.0(b), mandates that New York City value all property at full market value or bars the use of any system of classification that would result in any property being assessed at anything less than fair market value for the purpose of imposing real property taxes; and

.... (iii) that use of the Equalization Rate is barred by Sections 307 and 720 of the Real Property Tax Laws of the State of New York;

(B) Alternatively, should the first part of this motion be denied, staying the trial of the action pending the appeal from said denial, which appeal is to be taken on as expedited a basis as the appellate courts will allow.

2. The proceedings herein were brought pursuant to Article 7 of the Real Property Tax Law to review the real

property tax assessments fixed upon petitioner's property at 645-651 Madison Avenue, Manhattan, also known as Block 1374, Lot 49SE. The tax years are 1972-73 through 1979-80. Copies of the petitions for said tax years are annexed hereto as Exhibits A-1 through A-8, respectively.

3. On November 2, 1979, this action was placed on the inequality calendar of this Court. On June 18, 1980, notification was received from the Court that the case has been assigned a trial date of October 30, 1980. A copy of that letter is annexed hereto as Exhibit B. On the 15th day of July, 1980, we received a copy of a Court calendar indicating that the trial of this action had been set for October 15, 1980. A copy of that calendar is annexed hereto as Exhibit C. No formal notice of a change of the trial date has been given as of this date. Although counsel for petitioner did not appear in Court on the July 15, 1980 date, we have subsequently become aware that attorneys appearing in Court on the aforesaid date, were advised by the Court that application to select comparable parcels must be made no later than September 11, 1980; if the parties agree on comparable parcels, a tabulation of appraised values is to be filed no later than October 6, 1980. Petitioner has failed to receive notice from the Court of the aforesaid two dates as of the date of this affidavit.

4. As shown in the accompanying memorandum of law, this Court in *In the Matter of Colt Industries Inc. v. Tax Comm.* (N.Y.L.J. June 4, 1980), barred use of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") in inequality proceedings in the City of New York and held that inequality could be established in New York City only by the use of selected parcels or sales of property of like character—at least initially—located in the same section in which the subject property is located. This decision is directly contrary to holdings

of the Supreme Court in Kings County and Queens County and appears to be contrary to the holding of the New York State Court of Appeals in *Rokowsky v. Finance Administration of the City of New York*, 41 N.Y.2d 574, 394 N.Y.S.2d 176 (1977). The decision also appears to be directly contrary to the repeated mandates in the New York City Administrative Code requiring that all property be valued at full fair market value and be so placed on the tax rolls of the City. The decision further contravenes petitioner's right to due process and equal protection guaranteed by the Constitutions of the United States and the State of New York.

5. At a session of this Court held on the 15th day of July, 1980 at which were heard a number of motions requesting a stay of the trial of certain inequality actions, this Court denied such applications for stay; stated an affirmation of the Court's decision in *Colt, supra;* and further stated an intention to try such actions on the basis of the principles enumerated in *Colt.*

6. It is respectfully suggested, for the reasons shown in the accompanying memorandum of law, that *Colt* was incorrectly decided. Certainly, these issues have not been fully addressed by the appellate courts of this state and, to the degree that they have been so addressed, appear contrary to the holding in *Colt.* We therefore urge that this Court reconsider its decision in *Colt* and grant the relief requested in the first branch of the instant motion.

7. Alternatively, should this Court determine to deny such motion, we respectfully request the opportunity to appeal such determination prior to the trial of this action, now scheduled for October 15, 1980. We would immediately file a notice of appeal with the Appellate Division, First Department, and request expedited treatment at every stage of the appellate process. We most respectfully request that the trial of this action be stayed

during the pendency of such appeal. We believe it fundamentally unfair and a basic deprivation of due process for petitioner to be compelled to try such action while the law is in such a state of flux and uncertainty. We know of no damage that would be caused respondents by virtue of such stay and we can conceive of none. In the absence of a stay, respondents as well as petitioner would be compelled to incur the expense of this proceeding with knowledge that such exercise may ultimately be determined to have been unnecessary or futile. An estimate of the potential costs of such action is set forth in the annexed affidavit of Jerome Haims.

8. We further respectfully request that this motion be granted expedited treatment so that in the event the substantive portion of this motion is denied, we may proceed with the appellate process and allow the appellate courts to give their guidance in this unsettled and uncertain area of law.

WHEREFORE, it is respectfully requested that the substantive portion of this motion be granted in all respects and, alternatively, that the trial of this action be stayed during the pendency of petitioner's appeal from the denial of the substantive aspects of this motion.

DANIEL S. GREENFELD
Daniel S. Greenfeld

Sworn to before me this
28th day of July, 1980
A. PATRICIA GOLD
Notary Public

A. PATRICIA GOLD
Notary Public, State of New York
No. 31-4637548
Qualified in New York County
Commission Expires March 30, 1982

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION, BLOCK 1291, LOT 69 ("Greenfeld Affidavit II")

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In The Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56322/77
Block 1291, Lot 69

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL S. GREENFELD, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys for petitioner in the above-entitled action. This affidavit is made in support of petitioner's motion for an order pursuant to Rules 3211(b) and 3212(e) and Section 2201 of the Civil Practice Law and Rules:

(A) Dismissing, on the ground that they are without merit and granting partial summary judgment with respect to the following defenses in this action relative to the use by petitioner of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") for the purpose of establishing a cause of action based on inequality under Section 166-1.0 (b)(3) of the Administrative Code of the City of New York and under Sections 306, 307, 706 and 720 of the Real Property Tax Law of the State of New York;

(i) that use of the Equalization Rate is precluded because Section 166-1.0(b)(3) of the Administrative Code of the City of New York by its terms authorizes a classified system of assessment for real property tax purposes, which system exists in fact; and

(ii) that no other section of the Administrative Code, specifically Sections E17-8.0 and E17-11.0(b), mandates that New York City value all property at full market value or bars the use of any system of classification that would result in any property being assessed at anything less than fair market value for the purpose of imposing real property taxes; and

(iii) that use of the Equalization Rate is barred by Sections 307 and 720 of the Real Property Tax Laws of the State of New York;

(B) Alternatively, should the first part of this motion be denied, staying the trial of the action pending the appeal from said denial, which appeal is to be taken on as expedited a basis as the appellate courts will allow.

2. The proceedings herein were brought pursuant to Article 7 of the Real Property Tax Law to review the real property tax assessments fixed upon petitioner's property at 717 Fifth Avenue, Manhattan, also known as Block 1291, Lot 69. The tax years are 1977-78 through 1979-80. Copies of the petitions for said tax years are annexed hereto as Exhibits A-1 through A-3, respectively.

3. On February 27, 1980, this action was placed on the inequality calendar of this Court. On the 15th day of July, 1980, we received a copy of a Court calendar indicating that the trial of this action had been set for October 15, 1980. A copy of that calendar is annexed hereto as Exhibit B. No formal notice of a trial date has been given as of this date. Although counsel for petitioner did not appear in Court on the July 15, 1980 date, we have subsequently become aware that attorneys appearing in Court on the aforesaid date, were advised by the Court that application to select comparable parcels must be made no later than September 11, 1980; if the parties agree on comparable parcels, a tabulation of appraised values is to be filed no later than October 6, 1980. Petitioner has failed to receive notice from the Court of the aforesaid two dates as of the date of this affidavit.

4. As shown in the accompanying memorandum of law, this Court in *In the Matter of Colt Industries Inc. v. Tax Comm.* (N.Y.L.J. June 4, 1980), barred use of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") in inequality proceedings in the City of New York and held that inequality could be established in New York City only by the use of selected parcels or sales of property of like character—at least initially—located in the same section in which the subject property is located. This decision is directly contrary to holdings of the Supreme Court in Kings County and Queens County

and appears to be contrary to the holding of the New York State Court of Appeals in *Rokowsky v. Finance Administration of the City of New York*, 41 N.Y.2d 574, 394 N.Y.S.2d 176 (1977). The decision also appears to be directly contrary to the repeated mandates in the New York City Administrative Code requiring that all property be valued at full fair market value and be so placed on the tax rolls of the City. The decision further contravenes petitioner's right to due process and equal protection guaranteed by the Constitutions of the United States and of the State of New York.

5. At a session of this Court held on the 15th day of July, 1980 at which were heard a number of motions requesting a stay of the trial of certain inequality actions, this Court denied such applications for stay; stated an affirmation of the Court's decision in *Colt, supra;* and further stated an intention to try such actions on the basis of the principles enumerated in *Colt.*

6. It is respectfully suggested, for the reasons shown in the accompanying memorandum of law, that *Colt* was incorrectly decided. Certainly, these issues have not been fully addressed by the appellate courts of this state and, to the degree that they have been so addressed, appear contrary to the holding in *Colt.* We therefore urge that this Court reconsider its decision in *Colt* and grant the relief requested in the first branch of the instant motion.

7. Alternatively, should this Court determine to deny such motion, we respectfully request the opportunity to appeal such determination prior to the trial of this action, now scheduled for October 15, 1980. We would immediately file a notice of appeal with the Appellate Division, First Department, and request expedited treatment at every stage of the appellate process. We most respectfully request that the trial of this action be stayed during the pendency of such appeal. We believe it funda-

mentally unfair and a basic deprivation of due process for petitioner to be compelled to try such action while the law is in such a state of flux and uncertainty. We know of no damage that would be caused respondents by virtue of such stay and we can conceive of none. In the absence of a stay, respondents as well as petitioner would be compelled to incur the expense of this proceeding with knowledge that such exercise may ultimately be determined to have been unnecessary or futile. An estimate of the potential costs of such action is set forth in the annexed affidavit of Jerome Haims.

8. We further respectfully request that this motion be granted expedited treatment so that in the event the substantive portion of this motion is denied, we may proceed with the appellate process and allow the appellate courts to give their guidance in this unsettled and uncertain area of law.

WHEREFORE, it is respectfully requested that the substantive portion of this motion be granted in all respects and, alternatively, that the trial of this action be stayed during the pendency of petitioner's appeal from the denial of the substantive aspects of this motion.

DANIEL S. GREENFELD
Daniel S. Greenfeld

Sworn to before me this
28th day of July, 1980
A. PATRICIA GOLD
Notary Public

A. Patricia Gold
Notary Public, State of New York
No. 31-4637546
Qualified in New York County
Commission Expires March 30, 1982

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTIONS ("Haims Affidavit")

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE
TAX COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56323/77
Block 1374, Lot 49SE
Index No. 56322/77
Block 1291/Lot 39

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JEROME HAIMS, being duly sworn, deposes and says:

1. I am a licensed real estate broker and appraiser; I am additionally a valuation consultant—with twenty-five years of continuous experience—to private investors, lending institutions, pension funds, corporations, estates, developers and federal, state and city governmental agencies. I am President of Jerome Haims Realty, Inc. and a mem-

ber of the American Institute of Real Estate Appraisers (Secretary, New York Chapter), Society of Real Estate Appraisers (Senior Real Estate Analyst), American Society of Appraisers, American Right-of-Way Association (Senior Member), the Real Estate Board of New York, New York State and National Association of Housing and Redevelopment Officials, Connecticut Urban Renewal Association, Regional Plan Association, National Association of Real Estate Boards, Urban Land Institute, and Association of Governmental Appraisers. My professional activities include lecturing at the following institutions and for the following organizations: New York University, C. W. Post College, Society of Real Estate Appraisers, National Association of Real Estate Board, and Association of Governmental Appraisers. I have been qualified to testify as a real estate valuation expert in state and federal courts.

2. I estimate the approximate costs to be incurred by the petitioner in an inequality proceeding involving an office building located in Section 5 with eight open years to be as follows:

(i) Section 5 sales analysis: $2,500,000;

(ii) Section 5 sales analysis of comparable parcels: $150,000 to $200,000;

(iii) Appraisals of comparable parcels in Section 5: $500,000 to $650,000.

The cost would be somewhat, but not proportionately, less if fewer years were open.

3. I estimate the approximate time required to assemble data and report thereon, to be as follows:

(i) Section 5 sales analysis: 1 year;

(ii) Section 5 sales analysis of comparable parcels: 1 year;

(iii) Appraisals of comparable parcels in Section 5: 22 months.

4. It is my opinion that such a matter cannot adequately be prepared for trial by an October 1980 trial date; nor is it possible to compile a tabulation of appraised values of comparable parcels within Section 5 by October 6, 1980; nor is it possible to prepare appraisals and compile sales data by the date set for exchange of materials; nor is it possible to compile sufficient material to meaningfully determine selected parcels by September 11, 1980.

JEROME HAIMS
Jerome Haims

Sworn to before me this
25th day of July, 1980.
JO-ANN HAMILTON
Notary Public

JO-ANN HAMILTON
Notary Public, State of New York
No. 03-4621206, Bronx County
Term Expires March 30, 1981

DECISION OF THE APPELLATE DIVISION IN MATTER OF COLT INDUSTRIES, INC. (A COMPANION CASE)

Murphy, P.J., Kupferman, Sandler, Markewich, Lynch, JJ.

10559

In re Application of Colt Industries, Inc.,
Petitioner-Appellant, D.David

—against—

The Finance Administrator, et ano.,
Respondents-Respondents, L.Olarsch

Robert Abrams, Attorney General of the State of New York,
Intervenor-Respondent. J.M.Farrar

Order, Supreme Court, New York County (Mangan, J.), entered on June 12, 1980, affirmed, on the opinion of Mangan, J., at Special Term, without costs and without disbursements. All concur except Murphy, P.J. who dissents in part in a memorandum as follows:

Petitioner Colt Industries, Inc. (Colt) is the owner of an office building located at 430 Park Avenue in Manhattan. Colt brought seven proceedings to review the real property tax assessment on that property for various years between 1969 and 1977. In paragraph 8 of each petition, Colt alleged:

> "8. The said assessments are erroneous by reason of overvaluation and inequality in that the same are in excess of the full value of the said real property and of the sum for which said real property under ordinary circumstances would sell as of January 25th,

1975, as shown in column '8' of Schedule 'A' and in that said assessments are proportionately higher than similar property in the City of New York, and the extent of such overvaluation is shown in column '9' of Schedule 'A'."

As will be developed more fully below, this appeal is limited to a consideration of whether the assessments on Colt's property are erroneous by reason of inequality.

In its motion at Special Term, Colt sought, *inter alia*, to have RPTL § 307 (L. 1978, ch. 476, § 1) and RPTL § 720(3) (L. 1979, ch. 126, § 2) declared to be unconstitutional. This branch of Colt's motion precipitated a discussion by Special Term of Adm. Code § 166-1.0(b)(3). This provision reads as follows:

"b. Such review shall be allowed only on one or more of the following grounds, which must be specified in such petition:

• • •

"3. That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby."

Petitioner Colt construed Adm. Code §166-1.0(b)(3) as requiring that inequality in assessment be determined upon a "whole-roll" basis. Essentially, Colt maintained that the ratio of assessed valuation to full valuation was higher for its property than the ratio for all property upon

the assessment rolls in New York City. It was Colt's contention that its assessments should be adjusted downward through the use of that "whole-roll" comparison.

The respondents, on the other hand, read Adm. Code § 166-1.0(b)(3) as creating different classes of property in the five boroughs. Basically, it was respondents' belief that the petitioner's building should be compared with other high-rise office buildings in Manhattan.

Special Term adopted the respondents' reasoning and found that inequality within the boundaries of New York City must be resolved upon a "class" basis. Since Adm. Code § 166-1.0(b)(3) was special legislation covering New York City, Special Term found that RPTL § 307 was not controlling. Thus, the constitutionality of RPTL § 307 was not reached. In view of the fact that the equalization rate promulgated for the City of New York by the State Board of Equalization and Assessment (SBEA) was founded upon a "whole roll" comparison, the court at Special Term found that the SBEA rate was not a reliable measure for a "classified" system of assessment. Again, Special Term did not pass upon the constitutionality of RPTL § 720(3).

Historically, there is some indication that a "classified" system has been followed in assessing real property in New York City. Despite this historical precedent, the overriding question still remaining is whether the respondents have employed a proper method of assessment over these many years (*Hellerstein v. Assessor*, 37 N Y 2d 1, 5). In the absence of any controlling case law addressed to the correct construction of Adm. Code § 166-1.0(b)(3), this question may be approached as a novel one. The following considerations lead to the conclusion that the City of New York should follow the "whole roll" method of comparison.

First, attention should be focused upon the recent case of *Rokowsky v. Finance Administrator* (41 N Y 2d

574). The prime issue presented in *Rokowsky* was whether inequality of assessment could be established by comparison solely on the basis of the State equalization rate for a particular borough or whether the City rate must be used. In answering this question, the Court of Appeals stated, *inter alia*, that the City-wide rate must be used. In rejecting the petitioner's interpretation of Adm. Code § 166-1.0(b)(3), the Court of Appeals asserted: "A more reasonable interpretation, however, would permit comparison only with property on the assessment rolls in the aggregate." (*Rokowsky v. Finance Administrator, supra*, at 577.) This last statement by the highest court would seem to preclude any interpretation of Adm. Code § 166-1.0 (b)(3) that would permit classification of properties in New York City for purposes of assessment.

Second, Adm. Code § 166-1.0(b)(3) must be construed, if possible, to uphold its constitutionality. (McKinney's Statutes, § 150(c), pp. 321-325; *People v. Bell*, 306 N.Y. 110, 114.) In that regard, it would be unconstitutional for the City Counsel to permit the assessors to determine informally (i) the classes of real property in the City and (ii) the ratio at which each class would be taxed in relation to full value. (*Gautier v. Ditmar*, 204 N.Y. 20, 28.) Hence, another reason is presented for construing Adm. Code § 166-1.0(b)(3) in such a fashion as to find a "whole roll" rather than a "classified" system of assessment.

Third, particular cognizance must be taken of Adm. Code § E 17-8.0(b) which reads as follows:

> "b. Such statement shall contain the street, the section or ward, the block and lot and map or identification numbers of such real estate embraced within such district: the sum for which, in their judgment, each separately assessed parcel of real estate would sell under ordinary circumstances if it were wholly

unimproved: and separately stated, the sum for which the same parcel would sell under ordinary circumstances with the improvements, if any, thereon. The assessors shall include in such statement such other information as the finance administrator may, from time to time, require."

The Court of Appeals has found that the statutory test of full value is the price at which the property would sell "under ordinary circumstances." (*People ex rel. Parklin v. Miller*, 287 N.Y. 126, 129.) Consequently the respondents are obligated to assess all real property in New York City at full value. If all real property in the City is assessed at full value, then the ratio of assessed value to full value will be one to one for all property. Under such a circumstance, classes could not exist since all properties would have the same ratio of assessed to full value. Simply stated, the concepts of "full value assessment" and "classified assessment" are inconsistent, and thus can not co-exist in the same tax system. Adm. Code § E 17-8.0(b) makes it clear that New York City is on a "full value" system.

Fourth, Adm. Code § 166-1.0(b)(3) should be interpreted so as to avoid an absurd result (McKinney's Statutes, § 145, pp. 294-297). Undisputedly, a taxpayer may prove inequality by pleading and proving that the assessment ". . . has been made at a higher proportionate valuation than the assessment . . . of other real property in the assessment rolls of the city for the same year. . . ." This second portion of Adm. Code § 166-1.0(b)(3), following the disjunctive "or", needs no construction because it unambiguously refers to a "whole roll" comparison.

Inequality may also be shown with reference to the first portion of Adm. Code § 166-1.0(b)(3), preceding the word "or". A taxpayer may compare the assessment on

his property with "... other real prpoerty of like character in the same ward or section...." If the phrase "other real property of like character" is viewed as creating classes of real property, then the Code provision would create an absurd result. A taxpayer could prove inequality in assessment by either "class" comparison under the first portion or "whole roll" comparison under the second portion. To be consistent and to avoid chaos, the city's tax system may employ either "class" or "whole roll" comparison. It may not simultaneously employ these two incompatible formulae.

In order to harmonize the first portion of Adm. Code § 166-1.0(b)(3) with the second portion, the courts are given a certain degree of liberality in construing that first portion to conserve the spirit and intent of the entire section (McKinney's Statutes, § 145, p. 296). The first portion may be read in accord with the second portion if it is assumed that the "other real property of like character" has the same equalization rate as that of all the City real property. In order to facilitate the evidentiary task of a taxpayer in proving inequality, he may thus choose to establish his case through a comparison with "other real property of like character" rather than with properties selected from remote areas of the City. By seeking to prove inequality under the first portion of Adm. Code § 166-10(b)(3), it is incumbent upon the taxpayer to demonstrate that the "other real property of like character" is being correctly taxed vis-a-vis all the real property in the City. While this construction of the first portion does carry with it a minor assumption, it otherwise does give a harmonious reading to the entire section of the Administrative Code.

Where the New York City Charter and Administrative Code are silent on tax matters relating to practice, form, substance and procedural detail, resort must be had to

the provisions of the Tax Law (*People ex rel. American Sugar Refining Company v. Sexton*, 274 N.Y. 304, 306 307). However, for the reasons stated above, Adm. Code § 166-1.0(b)(3) constitutionally sets forth the pleading requirements for a tax proceeding based upon inequality. Therefore, as Special Term observed under a different construction of Adm. Code § 166-1.0(b)(3), there is no necessity for considering the constitutionality of RPTL § 307 insofar as that statute contains certain retroactive pleading requirements. Special Term properly denied as academic the branch of the motion to declare RPTL § 307 unconstitutional. Had that constitutional issue been reached, subdivisions 3, 4 and 5 of section 307 would have been declared unconstitutional for the reasons enumerated in *Slewett & Farber v. Board of Assessors* (— A D 2d —, 435 N.Y.S. 2d 313, upon reargument, — A D 2d —, N.Y.L.J., 4/13/81, p. 1, col. 2).

Neither the New York City Charter nor the Code sets forth the evidence that may be adduced in a tax proceeding challenging an assessment. Hence, resort must be had to section 720 of the Real Property Tax Law. Under the most recent amendment to RPTL § 720(3), a taxpayer may no longer use the SBEA equalization rate in proving inequality in any proceeding commenced after January 1, 1970, and not finally determined as of the effective date of the amendment, May 22, 1979 (L. 1979, ch. 126).

The legislature has the general power to prescribe rules of evidence and methods of proof. However, the legislature would violate due process of law if it passed a statute that would practically shut out the evidence on a particular point. (*Board of Commissioners of Excise v. Merchant*, 103 N.Y. 143, 148.) Despite the 1979 amendment to RPTL § 720(3), Colt may still prove inequality through the sample or the sales method. Hence, it can

not be said that the Legislature has closed off all avenues of proof.

Nonetheless, the 1979 amendment may not be viewed in a vacuum. That amendment was clearly part of a concerted legislative effort to forestall the consequences of the *Hellerstein* decision. Prior to the 1979 amendment, comparison with the SBEA rate was the simplest and surest method of establishing inequality (*Guth Realty v. Gingold*, 34 N Y 2d 440, 450). The legislature, through the 1979 amendment, thus removed the most direct and certain method of proving inequality for a reason totally unrelated to the validity of the SBEA rate. To the extent that the 1979 amendment represents an unfair legislative attempt to deprive Colt of effective redress in both the administrative and judicial forums, it deprives Colt of due process. RPTL § 720(3) should be declared unconstitutional insofar as it is retroactively operative against Colt's pending petitions that cover periods prior to its effective date of May 22, 1979. (*Contra, Slewett & Farber v. Board of Assessors, supra.*) It is unnecessary to reach the question of whether that statute may be validly applied against (i) a petition brought after the effective date to cover a tax period prior to the effective date and (ii) a petition brought after the effective date to cover a tax period after the effective date.

Accordingly, the order of the Supreme Court, New York County (Mangan, J.), entered June 12, 1980, insofar as appealed from, which, *inter alia*, denied the branch of the motion to declare RPTL § 720(3) unconstitutional, should be modified, on the law, by declaring RPTL § 720 (3) to be unconstitutional insofar as it is retroactively operative against pending petitions covering tax periods prior to May 22, 1979, and as modified, it should be affirmed.

Order filed.

OPINION OF JUDGE FARLEY (SUP. CT. NASSAU CO.) IN CANIGIANI v. BOARD OF ASSESSORS, SLIP OPINION

R:2,1

SUPREME COURT, NASSAU COUNTY—
SPECIAL TERM, PART IV (Cal.No.8T0052)

In the Matter of
JOSEPH N. CANIGIANI,
Petitioner,

vs.

THE BOARD OF ASSESSORS AND THE BOARD OF ASSESSMENT REVIEW OF THE COUNTY OF NASSAU, Respondent.

BY FARLEY, J.

DATED June 29, 1981.

INDEX No. 15394/74

KOEPPEL, SOMMER, LESNICK & MARTONE, P.C.
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By: Bernard Sommer, Esq.
Saul Fenchel, Esq.

EDWARD G. MCCABE, ESQ.
County Attorney of Nassau County
Attorney for Respondent
Nassau County Executive Building
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By: Jay M. Herman, Esq.

MEMORANDUM

The question to be answered in this litigation is whether a statute that abolishes a method of proof in a tax review proceeding based on inequality of assessment is rendered unconstitutional where the alternative means

of establishing inequality (ratio) are so prohibitively expensive as to preclude their use by aggrieved taxpayers.

Section 2 of Article 16 of the Constitution of the State of New York provides:

> "The legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation. Assessments shall in no case exceed full value."

Article 7 of the Real Property Tax Law sets forth the procedure by which taxpayers may secure a judicial review of the assessments levied against real property. One of the grounds upon which a proceeding may be founded is inequality in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll (RPTL § 706). "In an inequality case, the task is to make . . . a comparison between the rate of assessment of the subject property—i.e., the proportion of its assessed value to its full value—and the rates of assessment of a fair sampling of properties throughout the tax district." (*Matter of Wolf v. Assessors of the Town of Hanover*, 308 N. Y. 416, 421, citations omitted.) Consequently, the taxpayer must prove not only the ratio at which property in the tax district is assessed, but also that his own parcel is assessed at a higher rate (*People ex rel Yaras v. Kinnaw*, 303 N. Y. 224). The evidence that may be presented on the issue of whether an assessment is unequal is limited under subdivision 3 of section 720 of the Real Property Tax Law. The proof is restricted to the so-called parcel selection system with the exception that the statute permits . . . . evidence to be given by either party as to (1) actual sales of real property within the assessing unit that occurred during the year in which the assessment was made, and (2) the state equalization rate established for the roll containing the

assessment under review." (RPTL § 720[3]). This last method of proving ratio was barred to litigants when the legislature in 1979 deleted that portion of section 720 that allowed for the introduction in evidence of state equalization rates (Laws 1979, c. 126, § 2, eff. May 22, 1979).

This court held the prohibition against the use of the state rates unconstitutional (*Industrial & Research Associates v. Board of Assessors of the County of Nassau*, N.O.R., Index No.13281/73, decision dated Aug. 2, 1979). The Appellate Division reversed this determination [1] and found the statute constitutional, stating, in part:

> "What the Constitution certainly does prohibit is *de facto* abolition of remedy by limitation of proof to methods so prohibitively expensive in comparison with other potentially probative means as to effectively deprive all but the highly affluent of the ability to establish the right to relief. *On the limited record before us, petitioners have not established that the cost of proving actual sales is so exorbitant as to render the method illusory.*" (Italics added.)

and concluding:

> "So constricted in our inquiry, we must conclude that the constitutionality of subdivision 3 of section 720 of the Real Property Tax Law has not been established here because *it still seems* to offer proof of actual sales as a means by which inequality may be proven." (*Slewett & Farber v. Board of Assessors of*

1. This court's decision in *Slewett & Farber v. Board of Assessors of the County of Nassau*, 97 Misc 2d 637, was rendered before the enactment of Laws 1979, c. 126, and the appeal in the *Industrial & Research* case was not perfected when the Appellate Division heard arguments on *Slewett & Farber*. The Appellate Division, however, taking cognizance of the law at the time of the appeal, considered the constitutionality of the enactment when deciding *Slewett & Farber*.

the County of Nassau, — A D 2d —, NYLJ April 13, 1981, pp. 1, 20-23).

Following the decision of the Appellate Division, the petitioner in this proceeding, by motion, requested the court to vacate its decision—which had adopted the state equalization rates as proof of ratio—and to reopen the trial to hear evidence on the cost of establishing actual sales of real property that occurred in Nassau County for each of the years at issue (May 1, 1974 through May 1, 1980). That application was granted.

The point advanced by petitioner is that the legislative prohibition against the use of the state equalization rates as proof of ratio constitutes a deprivation of the right to review his assessment founded on a claim that an unequal share of the tax burden has been imposed on it, since the two alternative methods of proof allowed by section 720 (the sample parcel selection and cost of sales) are illusory because of the enormous expense associated with their employment. Petitioner further contends the Appellate Division recognized his dilemma but left open an adjudication of his rights because the record was devoid of evidence as to the cost of establishing ratio by proof of sales. This court, in reopening the trial to admit evidence of the cost of sales, is not unmindful that the Appellate Division refrained from expressly holding that the costs of proving ratio by the parcel selection method was unconstitutionally too expensive. After reviewing the *860* and *Guth* cases,[2] Mr. Justice Lazer, in *Slewett & Farber*, reflected:

2. *Guth Realty, Inc. v. Gingold*, 34 N Y 2d 440; *860 Executive Towers v. Board of Assessors of County of Nassau*, 84 Misc 2d 525, affd 53 A D 2d 463, affd *sub nom. Matter of Pierre Pellaton Apts. v. Board of Assessors of County of Nassau*, 43 N Y 2d 769.

> "But if parcel selection seems an unconstitutionally expensive method by which to prove inequality, it is not the exclusive method for the challenged statute also permits proof of sales." (*Slewett & Farber v. Board of Assessors of the County of Nassau, supra*).

That issue should not be skirted. Repeated reference to the prohibitive expenses incurred in proving ratio by the parcel selection system attest to both its impracticality and uselessness as a viable remedy (*860 Executive Towers v. Board of Assessors of County of Nassau, supra; Guth Realty, Inc. v. Gingold, supra; People ex rel Hagy v. Lewis*, 280 N. Y. 184). The court also takes judicial notice that there are over 400,000 separate tax parcels within Nassau County. The selection of sample parcels from this number as shown by the record in the *860* case involves an expenditure of time and money that renders the ascertainment of ratio by this method a travesty of justice to all taxpayers, rich and poor alike. The Appellate Division, in *Slewett & Farber*, fully recognized that this method of proof is an illusory evidentiary tool without a shadow of a doubt, and it behooves the courts to give final recognition to this well known fact. Certainly, Mr. Justice Lazer's plurality opinion, by its recital of the history of the *Guth* and *860* cases, implies no less. The court, in reopening this proceeding, accordingly did so for the limited purpose of taking testimony on the cost of sales.

Immediately prior to the date this hearing was scheduled to commence, the respondent had secured a temporary stay of all further proceedings from the Appellate Division. The court thereafter proceeded to hear testimony with respect to the cost of sales in another proceeding appearing on its calendar (*see Wilmar Construc-*

tion Corp. v. Board of Assessors of County of Nassau, Index No. 13315/71). When that testimony was completed, but before evidence of value was presented, the respondent obtained another temporary stay of 35 proceedings pending on this court's calendar, including the *Wilmar* case. Both stays were subsequently lifted, and the hearing in this proceeding resumed. At that time, petitioner requested leave to introduce by reference all the testimony received in *Wilmar* without prejudice to respondent's right to recall any of the witnesses it chose to cross examine, and without prejudice to its right to present any rebuttal evidence it deemed advisable. This motion was granted.

On this hearing, respondent adopted the same position it did in the *Wilmar* case, i.e., it offered no testimony on the cost of a sales survey and refrained from cross-examining any witnesses called by petitioner. The gist of respondent's objection to receipt of this testimony is that an Article 7 proceeding is not the proper vehicle for testing the constitutionality of the statute. However, counsel for the respondent failed to inform the court what procedural devices and advantages would be available in a declaratory judgment action that would be foreclosed to it on this hearing. The issue is simple and clearly defined. The court finds no need for further refinement by pleadings or discovery proceedings.

The witnesses produced by petitioner in the *Wilmar* proceeding whose testimony was incorporated in this case numbered eight. The first, Tracie Peddy, who examined the Nassau County Clerk's records with respect to conveyances, testified as to the number of transactions listed from May 1 through April 30 of each year for the period from 1970 through 1979. They were as follows:

Year	*Transactions Recorded*
May 1, 1970	27,176
May 1, 1971	30,889
May 1, 1972	33,170
May 1, 1973	28,571
May 1, 1974	26,528
May 1, 1975	25,802
May 1, 1976	27,963
May 1, 1977	29,755
May 1, 1978	30,509
May 1, 1979	31,082
Total 10 years	290,455
Average per year	29,045

Mrs. Peddy testified the County Clerk's records of conveyances listed, in addition to deeds, easements, leases, assignment of leases, lis pendens, deeds in lieu of foreclosure, and that it was not possible, without separately examining each instrument to determine its nature from the indices. She stated she examined 7,062 pages of the County Clerk's index to count the number of transactions recorded each year, and that the cost of photostating the index was 25 cents a page, or $1,765.00 for the 10-year period.

Theodore Powers, a real estate appraiser, broker, and consultant, testified he was familiar with real property transfer and mortgage records maintained by the Nassau County Clerk's Office, as well as the records and inspection practices followed by the Department of Assessment and Treasurer's Office of Nassau County. He stated that it would cost $18.56 per unit (Transaction) to confirm and verify the sales price of a conveyance, or $538,240 a

year, assuming there were an average of 29,000 transfers listed per year.

Mr. Powers' testimony outlined the various functions a person would be assigned; the number of transactions he or she would examine daily; and the per diem cost of the work. The work entailed sending the employee to the County Clerk's Office with a list of transactions that would have to be viewed from microfilm; scanning the film until the appropriate section, lot, and block were located; reading the information; making a determination of whether the transaction was eligible; abstracting the desired information, including the name, address, and telephone number of grantor, grantee, lawyer, bank, and title company, onto a form; examining mortgage libers for mortgage data; and confirming the assessment by checking the records of the assessment department. Upon returning to the office, he would be required to verify the sale by contacting, through the phone or mails, the parties, lawyers, mortgagee or title company; and thereafter complete the form to be processed by the statisticians.

Similar testimony was elicited from four other experts comprising Bernard Goodman, Eugene Albert, Howard F. Jackson, and Bruce Nagel. The last mentioned witness is the vice president of Cole, Layer, Trumble Company, a national firm engaged in mass appraisal work for the purpose of reassessing real property for local governments. This company did reappraisal work for the Town of Islip several years ago and is currently performing similar work for the County of Nassau. The other three witnesses are experienced and well known appraisal experts. Mr. Albert, in fact, has previously made studies of sales to assessment ratios in other jurisdictions of the state, which is recounted in his testimony. He stated approximately 25% to 30% of the sales examined in his studies were

rejected as ineligible and another 20% could not be verified.

Petitioner produced two statisticians, Louis Primavera and Bernard Gorman, who testified as to the cost of processing the sales data for the purpose of ascertaining the ratio obtained by dividing the total assessments levied against the properties sold in each year by their total sales prices. Mr. Primavera estimated the cost at $158,562, which included expenses attributable to the preparation of the forms to be supplied to the abstractor for transfer of pertinent information to punch cards, key punching, computer time, clerical and printing costs, labor, supervision and consultation fee. Mr. Primavera additionally testified that a random sampling study would not develop a statistically credible ratio because the measure of variability or standard deviation is too great. He explained that a variation between .08 and 1% would be considered large in relation to the number of transactions (sample size of 29,000 per year).

Dr. Gorman's estimate of the cost was $158,462, or essentially the same figure as arrived at by the other statistician. This witness also concluded that a random sampling to obtain a ratio was not feasible but was more explicit, stating that even if none of the 29,000 transactions a year were ineligible, the application of the principle of standard deviation would still necessitate the survey of 23,000 sales. He further stated that if the ineligible sales only represented 30%, the number of sales needed to compensate for this factor would exceed the 29,000 sales that occurred each year. He was therefore of the opinion, in view of the limited size of the samples (29,000), it would be necessary to utilize all sales to compute an accurate ratio to the third decimal point.

A summary of the cost analysis made by these experts for the 10-year period involved in the *Wilmar* pro-

ceeding is set forth in Schedule "A" annexed to this decision, and the translation of these figures to cover the 7 tax years under review in the subject proceeding appears on Schedule "A-1".

The uncontradicted testimony of these witnesses demonstrate a cost ranging from a low of $301,000 to a high of $644,000 a tax year. The petitioner, in this case, who had placed 7 years at issue, would therefore face an expense ranging between $2,100,000 to $4,500,000 to establish ratio by the cost of sales method. The property owned by petitioner is a one-story taxpayer located on a 16,000 square foot plot whose building area of 7,000 square feet has been partitioned to permit occupancy by 7 stores. The rental value of the tenanted space ranged from $5.00 a square foot in 1974 to $8.50 in 1980. The land, during these years, had a value ranging between $92,800 and $163,200. The assessment imposed against the property in each tax year under review was $55,300 which translates to a tax burden of $12,500 on May 1, 1974 to $18,000 for May 1, 1980. The lowest estimate given for the cost of a sales survey for a single year exceeds the net income realized by the taxpayer for all 7 years under review (*see Canigiani v. Board of Assessors of County of Nassau*, Index No. 15394, decision dated April 8, 1981). The highly exorbitant and prohibitive cost of establishing ratio by this method to this taxpayer whose tax refund in a given year could not exceed $10,000, requires no elaboration. The experience of this court in disposing of over 1,500 tax certiorari proceedings indicates the costs precludes use of the remedy by all but perhaps a handful of the most affluent taxpayers in Nassau County.

By constitutional mandate (N.Y.Const. Art. 16, § 2), the right to judicial review of property assessments is bestowed on taxpayers, and the statute (Real Property Tax

Law, Art. 7) implementing this directive has made inequality of assessment a ground for complaint (Real Property Tax Law § 706). The legislature, while retaining this remedy, has effectively abolished the means of obtaining relief by limiting the methods of proving ratio to evidence that is economically oppressive and prohibitive. Due process requires that some reasonably adequate and appropriate remedy be available for the enforcement of the rights conferred on property owners. Protection of due process is denied where the procedure prescribed for establishment of the right of redress is merely a colorable pretense. The legislature need not, of course, provide the most expedient method of relief, but neither may it totally frustrate the remedy. In short, the legislature, under the guise of prescribing rules of evidence, may not prevent a party from exhibiting his rights by virtually excluding all evidence that may be presented (*Board of Commissioners of Excise of City of Auburn v. Merchant*, 103 N. Y. 143, 148; 9 N.Y. Jur. [Constitutional Law] § 347, p.243; 21 N.Y. Jur. [Evidence] § 6, pp. 163-164). The total denial of a remedy effects a deprivation of property to the same extent as though the property had been taken by direct legislative enactment (*Gilman v. Tucker*, 128 N. Y. 190, 202).

The constitutional guaranty of due process demands that a litigant be allowed to introduce probative facts in support of his or her right to relief. Ratio in an inequality case is simply a mathematical calculation. The statistical data necessary to make that calculation is accumulated and processed by the State Board of Equalization and Assessment to support the rate it has promulgated pursuant to the powers invested in it (Real Property Tax Law § 202; *see, also*, N.Y. Const., Art. 5, § 1; Art. 8, § 101. The Court of Appeals has decisively ruled the state equalization rate is ". . . objectively . . . and expertly arrived at . . . .," and

has additionally observed that ". . . while the primary purpose of the state equalization rate may be to facilitate uniform State aid to localities, there is no discernible reason why it also may not be used in individual inequality cases (*Guth Realty, Inc. v. Gingold, supra,* at 450, 451). The state rate has therefore been judicially sanctioned as probative of the facts upon which the mathematical calculation of ratio is based and has, in fact, been recognized as *prima facie* evidence of ratio (*860 Executive Towers v. Board of Assessors of the County of Nassau, supra*). The legislative enactment (Laws 1979, c. 126) abolishing the use of the state rate denies to petitioner the right to present evidence of his claim unless the sample parcel system or actual sales are considered viable alternatives. They are not. Laws 1979, c. 126, therefore, is an unconstitutional deprivation of petitioner's right to present evidence in support of his claim. The effect of an unconstitutional amendment of a statute is to leave the enactment as if no amendment had been attempted (McKinney's Statutes, §§ 196, 377), since an unconstitutional act is inoperative as though it had never been passed (*People ex rel Farrington v. Mensching,* 187 N. Y. 8; *Van Antwerp v. State of New York,* 218 N. Y. 422).

The court, accordingly, finds the prohibition against the use of the state rates an unconstitutional deprivation of this petitioner's right to due process of law and allows their admission into evidence as provided before the passage of Laws 1979, c. 126, § 2. The order of this court vacating its decision is recalled, and upon consideration of the facts presented on this hearing, is reinstated. Settle judgment on notice.

/s/ THOMAS P. FARLEY
J.S.C.

STATUTES

Administrative Code of the City of New York, Vol. 2, ch. 7, Title A, Section 166-1.0

§ 166-1.0 *Proceeding to review tax assessment; contents of petition.*—a. Any person or corporation claiming to be aggrieved by the assessed valuation of real property may commence a proceeding to review or correct on the merits a final determination of the tax commission by serving on the president of the tax commission, or his duly authorized agent, a copy of a verified petition as prescribed by law. . . .

b. Such review shall be allowed only on one or more of the following grounds, which must be specified in such petition:

1. That the assessment is illegal, and stating the particulars of the alleged illegality, or

2. That the assessment is erroneous by reason of over-valuation, or

3. That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby.

Act of December 3, 1981, ch. 1057, §§ 305(2), 706, 707, 1801(a), 1981 N.Y. Laws

§ 305. Assessment methods and standard. . . .

2. All real property in each assessing unit shall be assessed at a uniform percentage of value (fractional

assessment) except that, if the administrative code of a city with a population of one million or more permitted, prior to January first, nineteen hundred eighty-one, a classified assessment standard, such standard shall govern unless such city by local law shall elect to be governed by the provisions of this section.

§ 706. Contents of petition. 1. This section shall apply in all assessing units other than special assessing units as defined in section eighteen hundred one of this chapter.

2. A proceeding to review an assessment shall be founded upon a petition setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation or misclassification, stating the extent of such overvaluation or the proper classification, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll by the same officers, and stating that the petitioner is or will be injured thereby. Such petition shall be duly verified by the petitioner, an officer thereof, or by an agent thereof who has been authorized in writing to verify and file such petition and whose authorization is made a part of such petition. Such petition must show that a complaint was made in due time to the proper officers to correct such assessment. Two or more persons having real property assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.

§ 6. Such law is amended by adding a new section seven hundred seven to read as follows:

§ 707. Contents of petition in special assessing units.

1. This section shall apply to special assessing units as defined in section eighteen hundred one of this chapter.

2. A proceeding to review an assessment shall be founded upon a petition setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation or misclassification, stating the extent of such overvaluation or the proper classification, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property in the same class on the same roll by the same officers, and stating that the petitioner is or will be injured thereby. Such petition shall be duly verified by the petitioner, an officer thereof, or by an agent thereof who has been authorized in writing to verify and file such petition and whose authorization is made a part of such petition. Such petition must show that a complaint was made in due time to the proper officers to correct such assessment. Two or more persons having real property assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.

§ 1801. Definitions. (a) "Special assessing unit" means an assessing unit with a population of one million or more.